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No. 84-1269

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

JOHN DEWITT,
Petitioner,

VS.

DEPARTMENT OF THE NAVY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

SUPPLEMENTAL APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX "A"

OPINION OF MERIT SYSTEMS PROTECTION BOARD

JOHN DE WITT
Petitioner

v.

DEPARTMENT OF THE NAVY
Respondent

NO. SF07528310150

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE
August 22, 1983

Before: PHYLLIS J. HAMILTON
Presiding Official

INTRODUCTION

By petition filed November 12, 1982, appellant, John DeWitt, appealed his removal by the Naval Supply Center, Oakland, California, from his position of

Store Worker, WG-4, effective October 23, 1982.

JURISDICTION

The Board has jurisdiction over this appeal pursuant to 5 U.S.C. Sections 7511(a)(1)(A) and 7512.

LAW, ANALYSIS, AND FINDINGS

General Law

To prevail in an adverse action based on misconduct, the agency must prove by a preponderance of the evidence that (1) the misconduct charged occurred, and (2) that the discipline imposed promoted the efficiency of the service. 5 U.S.C. Section 7513(a) (1980); Allen v. U.S. Postal Service, 2 MSPB 582 (1980). The efficiency of the service requirement involves a determination that there was a suffi-

cient connection between the charges and a legitimate government interest so that some discipline was warranted and a determination that the particular penalty fell within the limits of reasonableness. Douglas v. Veterans Administration, 5 MSPB 313 (1981). Thus the agency must show that the claimed misconduct occurred, discipline was warranted, and the penalty imposed was reasonable. Id.

Occurrence of Conduct

Appellant was removed for unauthorized possession of government property. Appellant was formerly a commissary worker at the Alameda Naval Supply Center store. The items he was charged with possessing were food and sundry items from the com-

missary which were found in his car on May 23, 1982.

In support of the charge, the agency submitted various reports of the investigating security officers and reports of the JAG officer assigned to conduct an administrative investigation and to make a recommendation regarding disciplinary action. Several but not all of the preparers of the various reports appeared at the hearing. The testimony of those witnesses and the record evidence establish the following.

On the evening of May 22, 1982, Robert Onweller, the Supervisor of the Meat Department, observed appellant walking through the store and stopping at various points. Mr. Onweller saw what he

believed to be an unusually large bulge under appellant's smock. Appellant left the store and went to his car in the commissary parking lot. Mr. Onweller reported his suspicion that appellant had stolen something to the store officer, Lt. Arcemont, who requested the base security to send assistance.

One of the responding officers, Patrolman Whitt, testified that he spoke with appellant upon his arrival at the store. Appellant denied having taken anything and consented to a search of his car. Appellant wanted to go to the rest-room before he went back to his car. Officers waited at appellant's car for him and he did not appear. At the end of the day, his car was towed to the security lot

and impounded. Appellant attempted to obtain his car later that evening, but security would not release it to him because he was intoxicated.

The following day, appellant contacted security about his car. Patrolman Dindleback testified that after appellant and his wife paid the towing fee, the car was searched upon appellant's consent. Patrolman Dindleback participated in the search and discovered the following items: partially frozen fish and turkey, soap, drano, and plastic bags.

Various statements were made by appellant and his wife at this time and during the subsequent investigation. Mrs. DeWitt said that a friend of hers with commissary privileges put the fish in

the car. She also said that she purchased some of the things at a Safeway Store in Richmond. Appellant stated that he purchased some of the items at the Food Bowl Store in Richmond.

Donald Patino, the JAG officer in charge of the investigation, testified that he compared the labels of the products found with the labels utilized by the Food Bowl. He was familiar with the labels used by Safeway because he normally shopped at those stores. Based upon the differences in the labels used by Navy Commissary stores and those used by commercial stores and the fact that the prices matched commissary food price lists to the cent, he determined that the items were in fact from the commissary. Iden-

tification was somewhat of a problem because the security officers released the items to appellant. They were not positive about the source of the items and were unsure about how to proceed with civilians because of the threat of civil liability. The record contains photocopies of the type of labels utilized by Safeway, Food Bowl, and the commissary stores (Agency File, Tab 2S). The commissary store labels are obviously different from the others.

Appellant denied taking the items found. He testified that the bulge observed by Mr. Onweller was merely his labeling gun which was stuck in a pocket under his jacket. He admitted that he left the premises when first confronted by

security. He testified that he did so because he had a loaded gun in his car and was afraid he would get in trouble if it were found by security. With regard to the items found, appellant offered no explanation. He testified that he had purchased fish at the Food Bowl on May 20, 1982. Upon further questioning, he admitted that the partially frozen fish found on May 23, 1983, was not the same fish. When asked specifically where the items came from, he testified that he did not know but assumed his wife left them in the car. When asked what his wife's explanation was, appellant testified that he never specifically asked his wife if she left the items. Neither appellant's

wife nor her friend who allegedly left the items in the car, appeared at the hearing.

There is no dispute that the items were found in appellant's car. Thus the issues to be determined are whether the items were from the commissary and whether appellant's possession was unauthorized, in other words whether he stole the items. Regarding the first issue, the agency's evidence shows that the labels of the items found match commissary labels and do not match several commercial store labels. In addition, the prices on each item found were exactly the same prices as those noted on the commissary price list for all of its stock. I find this evidence persuasive, particularly in view of appellant's testimony that he does not know

where the items came from. I also have considered the fact that the food items were still partially frozen on May 23, which is consistent with them having been placed in a car while frozen solid the evening before. Thus, I find that the items found in appellant's car were commissary store items.

With regard to appeallant's theft, I give little weight to his denial for the following reasons. First, appellant's flight when confronted by security indicates a consciousness of guilt on his part. Appellant's explanation for his flight, that he had a loaded gun in his car, is unbelievable. The security officers did not find a gun in the car after a thorough search. Although appel-

lant testified that the gun was still in his console when he finally retrieved his car, I do not believe that the officers would fail to take action based upon that violation of the law or at the very least note it in their reports. Thus, I find that appellant's flight is circumstantial evidence of his guilt. I further find that his credibility is significantly diminished by his obviously fabricated explanation for his flight.

In addition, I find it totally incredible that a person faced with loss of his job would not find out on his own where the stolen items came from. Yet appellant testified that he did not even talk to his wife about where the items came from. If there was a plausible

explanation for how the items found their way to appellant's car, he did not present it. A reasonable person, under the circumstances, would have done so. The fact that the items were found in appellant's car is persuasive evidence that he put them there. This evidence, when considered with evidence of his flight, the conflicting statements made by him before the hearing, and the absence of an explanation at the hearing, persuades me that it is more likely true than untrue that appellant stole the items. Thus, I find that the agency has met its burden of proof. The charge is sustained.

Efficiency of the Service

The evidence establishes that there is a sufficient connection between the

charge and the efficiency of the service so that a penalty is warranted. In Phillips v. Bergland, 586 F.2d 1007 (4th Cir. 1978), the courts stated that theft of government property has an obvious impact on the efficiency of the service.

This Board has consistently held that "....an act which goes to (the employee's) reliability, veracity, trustworthiness, and ethical conduct...certainly affect the efficiency of the service." Warner v. Department of the Navy, 4 MSPB 413 (1980). Similarly, in Dennis v. Department of the Navy, 5 MSPB 313, at 346 (1981), the Board citing Phillips, supra, held that theft of government property "carries on its face prejudice to the service," and is "without question related to the faithful

and loyal performance of an (employee's) duties."

The purpose of the Board's review of the penalty is to assure that the agency conscientiously considered the relevant factors and, in choosing the penalty, struck a responsible balance within the limits of reasonableness. Douglas, supra, at 331. Factors I find relevant to the selection of penalty here are: 1) appellant's length of service and past work record; 2) the nature and seriousness of the offense; 3) the fact that appellant's conduct was intentional; and, 4) the special position of trust occupied by appellant as a Store Worker.

Although appellant had worked at the agency for over thirteen years, I find

that the agency's removal penalty was neither arbitrary nor unreasonable under the circumstances of this case. Further, even though no prior disciplinary record was cited by the agency, this offense is so serious as to warrant removal for the first offense. The Board in Jones v. Department of the Navy, MSPB Docket No. AT07528110479 (January 7, 1983), found that removal was an appropriate penalty for the theft of government property since the appellant's honesty and integrity were of particular importance to the agency in view of the position of trust occupied by the appellant in the care and the control of the very goods that he was charged with stealing.

Accordingly, I find no reasons in mitigation sufficient to disturb the agency's decision in this case.

Finally, appellant alleged harmful procedural error because the agency directed the JAG officer to conduct the administrative investigation and not the Naval Intelligence Service (NIS). The appellant has the burden of proving the action was harmful to him. 5 C.F.R. Section 1201.56(b)(1). Appellant presented no evidence of argument to establish the harm suffered by him. Preliminary to proof of harm, however, is a showing of error. Svejda v. Department of the Interior, 7 MSPB 36 (1981). It was appellant's position that the agency was required to go to NIS first. One of the

agency witnesses confirmed that indeed that was the general practice. However, no evidence was presented that that procedure was a requirement under law, rule, or agency regulations. Thus, I find that appellant has failed to meet his burden of proof on this affirmative defense.

Having found that the removal action is supported by a preponderance of the evidence, that it promotes the efficiency of the service, and that there was no harmful error committed by the agency, the action is sustained.

DECISION

The removal action is AFFIRMED.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on

September 26, 1983 unless a petition for review is filed with the Board within 35 calendar days of issuance of this decision.

Any party to this appeal, the Director of the Office of Personnel Management and the Special Counsel may file a petition for review of this initial decision with the Merit Systems Protection Board. The petition shall set forth objections to this decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419. An infor-

mation copy of the petition should be filed with the Presiding Official at the San Francisco Regional Office.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the Presiding Official is based upon an erroneous interpretation of statute or regulation.

The Director of the Office of Personnel Management may file a request for review only if he/she is of the opinion

that the decision is erroneous and will have substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office. 5 U.S.C. Section 7701(e)(2).

Pursuant to 5 U.S.C. Section 7703(B)(1) * The appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20005. Such a petition may not be filed while the case is pending

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* As modified by Section 127 of the Federal Courts Improvement Act of 1982 to be codified at 28 U.S.C. Section 1259(a)(9).

before the Board. To be timely, the petition for judicial review must be received by the Court within 30 days of the final Board decision.

FOR THE BOARD:

PHYLLIS J. HAMILTON
PRESIDING OFFICIAL

SUPPLEMENTAL APPENDIX "B"

ORDER OF MERIT SYSTEMS PROTECTION BOARD

JOHN DE WITT
Petitioner

v.

DEPARTMENT OF THE NAVY
Respondent

NO. SF07528310150

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

Before: PHYLLIS J. HAMILTON
Presiding Official

ORDER

Having fully considered the appellant's petition for review of the initial decision issued on August 22, 1983, and finding that it does not meet the criteria for review set forth at 5 C.F.R.

§ 1201.115, the Board hereby DENIES the petition.*/

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to

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*/ Appellant's allegations primarily constitute a disagreement with certain factual findings and conclusions made by made by the presiding official, and are not sufficient to warrant a full review of the record. See Weaver v. Department of the Navy, 2 MSPB 297 (1980).

Appellant has not shown "harmful" error by the agency. See Parker v. Defense Logistics Agency, 1 MSPB 489 (1980).

Appellant has made no showing of disparate treatment. See Woody v. General Services Administration, 6 MSPB 410 (1981).

seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

_____ _____

Robert E. Taylor

Washington, D.C. Secretary